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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. GREGORY FRANCIS TERRA, Defendant and Appellant.	C040088 (Super. Ct. No. 01F03658)

Defendant Gregory Francis Terra was convicted after a jury trial of spousal battery occurring on May 1, 2001. (Pen. Code, § 273.5, subd. (a).)[1] Defendant admitted three prior felony convictions within the meaning of sections 667, subd. (b) through (i) and 1170.12 and was sentenced to 25 years to life in prison.

On appeal, defendant contends he was deprived of his constitutional rights to effective assistance of counsel and

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[1] Further undesignated statutory references are to the Penal Code.

confrontation of witnesses due to his counsel's failure to recall and cross-examine an expert witness who testified about the battered women's syndrome (BWS). He also contends the judgment must be reversed due to the trial court's failure to instruct the jury sua sponte on the limited use of BWS evidence. We shall affirm.

BACKGROUND

On May 1, 2001, defendant's wife, Gayle Spano-Terra was home with defendant.[2] Spano-Terra is an alcoholic and drinks a bottle of wine every day. On this occasion, she had drunk a few glasses of wine.

At approximately 2:00 a.m., Spano-Terra called defendant's brother, Gary Terra, and told him defendant had hit her and was trying to choke her. Spano-Terra was yelling and screaming but did not sound like she was drunk. Gary Terra heard defendant say, "Give me the phone" and then the line went dead. Gary Terra called 9-1-1.

Several Sacramento County deputy sheriffs, including Anthony Saika, responded to the call and arrived at the residence around 2:30 a.m. Saika heard a male voice inside the residence yelling in an aggressive manner. Saika knocked on the door several times but no one responded. The officers gained entry by cutting the screen and unlocking the door.

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[2] Defendant was also charged with spousal abuse occurring on August 8, 2001, but was found not guilty by the jury of that offense.

The officers announced their presence and Spano-Terra emerged from the back bedroom saying, "'I fell, I fell, I fell.'" Her right eye was swollen and bruised and there was blood on the front of her shirt. She appeared to be scared and to have been drinking, although she was not stumbling. Defendant followed her out of the bedroom.

Upon questioning, Spano-Terra stated she had fallen on her face two days earlier. She said she had locked herself out of the residence and fallen while attempting to crawl through a window. However, her eye was progressively closing shut and Saika believed the injury to be recent. She was adamant that defendant had not injured her and pleaded with Saika to take her to jail. The officers continued to question her.

Spano-Terra stated she was having an allergic reaction that was causing her nose to bleed and that she bruised slowly. When one of the officers suggested that defendant had assaulted her, she denied it and stated she would lie to the district attorney if defendant was prosecuted.

Finally, Spano-Terra told the officers she had begun her menstrual period and defendant became angry when she bled on the new sheets. Defendant hit her on the face with the back of his hand. She explained that she had provoked defendant because she was an awful wife and they were under stress. One of the officers noticed holes in the walls and Spano-Terra told him defendant had made the holes a few days earlier. She admitted defendant had pushed her in the past but "never anything like this."

At trial, Spano-Terra testified she did not remember calling Gary Terra, nor recall how she was injured. She said defendant had gone to bed and she had been on the sofa drinking wine. She fell asleep on the sofa and next remembered walking into the bedroom. She sat on the edge of the bed and asked defendant why he had gone to bed without her but did not remember much after that. She did not remember how she had received injuries to her chin/neck area or face. However, she did say she had injured her arm climbing through the window a few days before.

Spano-Terra had been talking to defendant daily prior to trial. She was a little afraid of him and did not want to testify nor wish him incarcerated. She testified that she had flashed back to a previous husband's abuse when she was drinking. She would have told someone defendant had hit her when he had not because of her alcohol consumption.

Linda Barnard, a licensed marriage and family therapist and expert in domestic violence and BWS, was called by the prosecution at trial. She had never talked to Spano-Terra and was testifying only generally regarding domestic violence and BWS. She testified that BWS is not a diagnosis but a list of characteristics common to women involved in long-term abusive relationships. Most common are post-traumatic stress disorder, depression, anxiety, sleep disturbance, extreme fear, anger, sense of helplessness, low self-esteem, low self-worth and self-blame.

There are misconceptions about domestic violence. Very few victims report abuse as soon as it first happens and only 10 percent report it at all. The first report is not usually to law enforcement. Approximately 71 percent of domestic violence victims change their story, recant or become uncooperative at some point in the prosecution. The two most common reasons for a change of story are fear and love. Sometimes victims vacillate between being cooperative and uncooperative.

Barnard also testified about the cycle of violence. In the first phase, tension builds with arguing, slapping and pushing. Acute battering occurs in the second phase. The third phase is a period of tranquility in which the batterer apologizes and promises not to do it again. The cycle is often repeated in a relationship.

Alcohol does not cause domestic violence but it does provide an excuse for it. Some battered women use alcohol to numb themselves from the pain or emotional upheaval of the violent relationship, but it slows their reactions and makes them more vulnerable to injury. Battered women who abuse alcohol are sometimes viewed less sympathetically by their friends, relatives and law enforcement.

Attempting to leave the relationship with the abuser does not always prevent further injury or end the cycle. The perpetrator of domestic violence can still maintain control even while he is incarcerated.

After Barnard testified, defense counsel indicated to the court that he wished to reserve his cross-examination. The court excused Barnard subject to recall.

During defense counsel's examination of Spano-Terra, the prosecutor objected on relevance grounds to questioning about Spano-Terra's former husband. After a sidebar conference, the court allowed defense counsel to proceed with his line of questioning.

Later, as the court began to instruct the jury, defense counsel requested a sidebar and advised the court as follows:

"[Defense Counsel]: Your Honor, apparently I--apparently it's my error. I believed that Miss Barnard was going to be back here. I had reserved my cross-examination of her until after Gayle, the victim, had been placed on the stand, *and the reason being is because I need to lay a foundation for asking Miss Barnard the questions I was going to ask her*. Apparently it's my error, I thought she was going to be or she was supposed to be here, and I intended to ask her those questions. When I was asking Gayle some of the questions, I believe we had a side bar, and you indicated that I could not ask those questions, you felt they were irrelevant unless I was going to call Miss Barnard back, and I said that okay, well, I would. *I didn't necessarily want* to on that point, but I figured I needed to get that information out and so--

"THE COURT: What questions are you referring to that I did not allow you to ask?

"[Defense Counsel]: Well, I was asking questions about Gayle's history, about her alcoholism, about the flashbacks, about when she was having flashbacks what was she experiencing, other things like that, and I believe at that point the District Attorney had objected, and we went to a side bar, and you said that what I was asking would be irrelevant unless I was going to call Miss Barnard, and at that point I indicated I would. It's--I've apparently--it's--I can only claim--I will claim it's my error.

"THE COURT: Counsel, you did ask the questions to--I remember the witness--specifically you asked her if she remembered calling her husband by a former name of a former husband."

"[Defense Counsel]: That's correct.

"THE COURT: I don't believe that I did not allow you to ask any questions. I believe I specifically stated that you said you were going to tie it up later on, but I didn't overrule--I mean, I didn't prevent you from asking any questions.

"[Defense Counsel]: That is correct, Your Honor. You did not. I believe what you said at side bar was if I was not going to call Barnard back, then the questions I was asking would be irrelevant. I said I was laying a foundation, and I believe the District Attorney made a comment you're going to try to prove or you think she's crazy, meaning the victim, and you know, I was--I didn't commit myself as to what I was trying to do by asking

the questions, but I believe at that point it was understood that I would be having Barnard come back.

"THE COURT: First, let's go step by step on this. *You agree you asked every question of the victim that you wished to ask of for* [*sic*] *her?*

"[Defense Counsel]: *That's correct. I did.*

"THE COURT: All right. And I heard you say you reserved your right to call her back, but on Thursday I specifically asked you if you rested. We had several discussions about what was going to take place today. We went through jury instructions this morning. At no point did you indicate to me on the record or to anyone that you expected any witness to be back this afternoon. I'm somewhat at a loss here.

"[Defense Counsel]: Then, Your Honor, it's my error. That's fine.

"THE COURT: *What is it that you're proposing now?*

"[Defense Counsel]: *Your Honor, actually after reviewing my notes, as long as the Court's going to allow me to make comments on what I elicited from the victim I will say we go ahead and instruct and we argue.*

"THE COURT: *I'm going to allow you to argue anything that's in the record, sir.*

"[Defense Counsel]: Okay." (Italics added.)

Thereafter, both counsel agreed to go forward with instructing the jury.

DISCUSSION

I

Defendant first contends he was denied constitutionally effective assistance of counsel when his attorney forgot to recall and cross-examine the BWS expert. We reject this claim on appeal.

In order to demonstrate ineffective assistance of counsel, a defendant must establish that his counsel's performance fell below the objective standard of reasonableness under prevailing norms, and that but for counsel's deficiency it is reasonably probable that the defendant would have obtained a different result. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

A claim on appeal of ineffective assistance of counsel must be rejected "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People* v. *Wilson* (1992) 3 Cal.4th 926, 936, citing *People* v. *Pope* (1979) 23 Cal.3d 412, 426.) Here, counsel was not given any such opportunity, and a satisfactory explanation could exist. For instance, trial counsel could have determined that, once the trial court stated he could make his desired argument despite the lack of cross-examination, it would have been too risky to recall an expert witness that may be hostile to his position or client.

Moreover, defendant argues that his trial counsel was ineffective in forgetting to recall the expert because he could

have cross-examined her regarding the weaknesses in the BWS theory. Yet, there is absolutely no indication in the record that trial counsel ever intended to pursue that line of questioning. In fact, trial counsel conceded that the victim was a "battered woman" but attempted to establish that the batterers were people other than defendant and that she had been confused due to alcohol abuse. Thus, it appears from the record that counsel did not cross-examine the BWS expert on the theory suggested by defendant on appeal for tactical reasons.

We are wary of adjudicating claims casting aspersions on counsel when counsel is not in a position to defend his conduct. A claim of ineffective assistance of counsel instead is more appropriately made in a habeas corpus proceeding. (*People* v. *Wilson*, *supra,* 3 Cal.4th at p. 936.) Accordingly, we reject defendant's claim.

II

Defendant next contends that his right to confront the witnesses against him guaranteed by the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution was violated by his counsel's failure to recall and cross-examine the BWS expert. This claim lacks merit.

"[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury the facts from which jurors

. . . could appropriately draw inferences relating to the reliability of the witness.'" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 (*Van Arsdall*), quoting *Davis v. Alaska* (1974) 415 U.S. 308, 318; see also *People v. Frye* (1998) 18 Cal.4th 894, 945-946.)

Here, defense counsel realized his omission after resting his case. The record, however, clearly reflects that defense counsel then *chose* not to request to recall the BWS expert after being informed he would be permitted to make his desired argument. When asked how he proposed to proceed, counsel stated "Your Honor, actually after reviewing my notes, as long as the Court's going to allow me to make comments on what I elicited from the victim I will say we go ahead and instruct and we argue." The trial court specifically stated "I'm going to allow you to argue anything that's in the record, sir" and counsel responded "okay" and agreed to proceed with instructing the jury. Thus, defendant was not prohibited from engaging in any cross-examination of the BWS expert.

III

Finally, defendant claims the judgment must be reversed because the trial court failed to instruct the jury, sua sponte, regarding the limited use of BWS evidence.

In an appropriate case, psychological evidence, such as rape trauma syndrome, child molest syndrome, or battered women's syndrome, may be admitted to disabuse jurors of common sense misconceptions about the behavior of persons in the affected groups. (*People v. Erickson* (1997) 57 Cal.App.4th 1391, 1401.)

For example, if a victim delays complaining of an incident or, having complained, attempts to retract the complaint, syndrome evidence may explain such behavior and would be admissible to demonstrate that the behavior is not inconsistent with the incident having occurred. (See *People v. Morgan* (1997) 58 Cal.App.4th 1210, 1214-1216.) However, syndrome evidence generally cannot be admitted as proof that the incident in fact occurred. (*Ibid.*)

Generally, "absent request by a party, there is no duty to give an instruction limiting the purpose for which evidence may be considered." (*People v. Nudd* (1974) 12 Cal.3d 204, 209, overruled on other grounds in *People v. Disbrow* (1976) 16 Cal.3d 101, 113.) Defendant relies on *People v. Housley* (1992) 6 Cal.App.4th 947 for the proposition that the courts have, nevertheless, imposed a sua sponte duty on the trial court to instruct the jury of the limited use of evidence such as BWS evidence. (See *People v. Housley, supra,* 6 Cal.App.4th at pp. 958-959 [considering the duty to instruct on the limited use of Child Sexual Abuse Accommodation Syndrome].)

We agree that, upon request, the jury should be instructed that such evidence is admissible solely for the purpose of showing the victim's reactions are not inconsistent with having been abused and that the expert's testimony is not intended and should not be used to determine whether the victim's claim of

abuse is true.[3] (*Id.* at p. 959.) We do not believe, however, that a sua sponte duty to give the instruction exists in light of the language in *People v. Humphrey* (1996) 13 Cal.4th 1073, wherein the California Supreme Court repeatedly referred to the court's duty to give the instruction "upon request." (*People v. Humphrey, supra,* 13 Cal.4th at p. 1088, fn. 5 (maj. opn. of Chin, J.), pp. 1090-1091 (conc. opn. of Baxter, J.), and p. 1100 (conc. opn. of Brown, J.).)

Even assuming, without deciding, the court had a duty to give the instruction sua sponte, any failure to instruct the jury on the limited use of the BWS expert's testimony was clearly harmless. (See *People v. Watson* (1956) 46 Cal.2d. 818, 836.) The purpose of this limitation is to prevent the

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[3] CALJIC No. 9.35.1 provides in pertinent part:

"Evidence has been presented to you concerning battered women's syndrome. [This evidence is not received and must not be considered by you to prove the occurrence of the act or acts of abuse which form the basis of the crime[s] charged.]

"[Battered women's syndrome research is based upon an approach that is completely different from the approach which you must take to this case. The syndrome research begins with the assumption that physical abuse has occurred, and seeks to describe and explain common reactions of women to that experience. As distinguished from that research approach, you are to presume the defendant innocent. The People have the burden of proving guilt beyond a reasonable doubt.]

"You should consider this evidence for certain limited purposes only, namely,

"[that the [alleged victim's] [defendant's] reactions, as demonstrated by the evidence, are not inconsistent with [her] having been physically abused] [,or]

"[the beliefs, perception or behavior of victims of domestic violence]. . . ."

potential misuse of the expert's testimony by allowing the jury to believe the victim has been essentially diagnosed with a syndrome that presupposes the abuse occurred. (See *People v. Jeff* (1988) 204 Cal.App.3d 309, 331.)

Here, the expert specifically told the jury she had not met the victim and had no knowledge of the case. She specifically explained that BWS was not a diagnosis. Her testimony was couched in general terms, by describing behavior common to abused victims as a class, rather than attributing any syndrome or behavior to a particular individual. In light of the testimony given in this particular case, it is unlikely that the jury interpreted the expert's testimony as improperly suggesting the victim in this case had been diagnosed or that the expert had determined that defendant had abused this victim. (See *People v. Housley, supra,* 6 Cal.App.4th at p. 959; see also *People v. Jeff, supra,* 204 Cal.App.3d at pp. 331-332.)

Thus, it is not reasonably probable that defendant would have received a more favorable verdict if an appropriate limiting instruction had been given.[4]

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[4] Because we find no prejudice from the failure to instruct the jury on the limited use of BWS evidence, there is equally no prejudice from the failure of counsel to request the instruction. Consequently, no ineffective assistance of counsel is demonstrated in the record, because such a claim requires a showing that there is a reasonable probability that the result would have been more favorable to the defendant. (See *In re Alvernaz* (1992) 2 Cal.4th 924, 945.)

DISPOSITION

The judgment is affirmed.

SIMS, Acting P.J.

We concur:

CALLAHAN, J.

ROBIE, J.